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No. 02-1848

IN THE

SUPREME COURT OF THE UNITED STATES

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. OF VERNON, CONNECTICUT, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF FRANKLIN P. KOTTSCHADE

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INTEREST OF EVANDRO S. SANTINI AND SANTINI HOMES, INC.[1]

Evandro Santini has built homes and apartments for 35 years in the suburbs of Hartford, Connecticut. After immigrating to the U.S. in 1957 at age 17, he served several apprenticeships in the building trades. He founded Santini Homes, Inc. in 1970, and has been its president ever since.

Mr. Santini and his company (hereinafter "Santini") have been litigating for the past nine years, through the Connecticut courts and now in the federal courts, a temporary taking claim that vividly illustrates the "conundrum" and the jurisdictional "Catch 22" created by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and discussed in the *Kottschade* petition. Santini's claim arises from a public agency's designation of his under-construction residential subdivision as a finalist for condemnation as a disposal site for low-level radioactive waste, and the resulting, total destruction of the property's economic use. The case is presently pending in the U.S. Court of Appeals for the Second Circuit, entitled *Santini v. Connecticut Hazardous Waste Management Service*, No. 02-9150. Oral argument occurred before Judges Newman, Parker, and Winter on June 16, 2003.

As of June 9, 1991, Santini was building a fully-approved residential subdivision on 74 acres in Ellington, Connecticut. He had been working on the project for six years and had invested $5 million and borrowed

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[1] Pursuant to Rule 37.6 of this Court, the *amici* state that their counsel authored this brief and the *amici* paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than the *amici* made a monetary contribution to its preparation.

$4 million to finance it. The infrastructure and road system had been installed and four model homes were being shown to prospective buyers.

The Connecticut Hazardous Waste Management Service ("Service") is "a public instrumentality and political subdivision" of the State, *see* Conn. Gen. Stat. §§22a-134bb and 22a-163b. The Service's principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction within Connecticut of a disposal facility for low-level radioactive waste. *Id.* Connecticut's mandate to the Service to locate, condemn, and build an in-state disposal site was the direct result of a federal requirement to develop new state or regional disposal facilities, *see* Pub. L. No. 96-573, 94 Stat. 3347 (1980), codified at 42 U.S.C. §§2021b *et seq.* This mandate was accompanied by the threatened imposition of severe financial penalties on any state that did not meet certain deadlines. Connecticut adopted facility development legislation principally in 1987, Conn. Public Act 87-540.

On June 10, 1991, after two years of secret deliberations, the Service announced that the Santini development was one of three finalist sites (the other two being undeveloped land within 1.5 miles) for condemnation for public use as a disposal site for in-state generators (utilities, hospitals, universities, and industrial companies) of low-level radioactive waste. Shortly thereafter, the *Hartford Courant* displayed on its front page a map of the Santini subdivision next to the symbol for radioactivity.

Residents and public officials in Ellington and surrounding towns reacted to the announcement with protests and civil disobedience. In January 1992, Connecticut's governor proposed revocation of the agency's

mandate to condemn an in-state site, in favor of seeking a municipality to volunteer. The legislature took four months to adopt the revocation, which was signed into law on May 5, 1992. By this time, however, economic use of the Santini development had been completely destroyed, and this continued until at least June 1993.

Since, under *Williamson County*, Santini could not bring a threshold taking claim in federal court, he sued (in 1994) under the takings clause of the Connecticut Constitution Article I, §11 ("The property of no person shall be taken for public use, without just compensation therefor"). Since no state or local agency had jurisdiction over his predicament, he sued in state court. The Connecticut Supreme Court has confirmed the accuracy of Santini's pleading, holding that a Fifth Amendment taking claim *cannot be joined* with a state law taking claim brought in state court pursuant to *Williamson County*. *See Melillo v. New Haven*, 732 A.2d 133, 143 n.28 (Conn. 1999).

At the state court trial in early 1998, the real estate appraisers retained by both sides *agreed* that from June 1991 to June 1993, Santini was unable to sell any completed home or finished lot, develop remaining acreage, or generate *any* revenue.

Notwithstanding the exclusive state law basis of his taking claim, Santini expressly argued that the Connecticut courts, when interpreting the state's takings clause, must afford no less protection than is provided by the Takings Clause of the Fifth Amendment to the U.S. Constitution. Citing, for example, *Mills v. Rogers*, 457 U.S. 291 (1982) and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980), Santini explained that decisions of this Court interpreting the Bill of Rights furnish the "floor" for protection of civil rights, and

thus in interpreting the state's taking clause, the Connecticut courts needed to adhere to Fifth Amendment tests and standards. In making this argument, Santini reviewed how Connecticut's two takings tests, which date to the 1960's and 1970's, were inconsistent with current federal standards, in particular this Court's takings tests as set forth in *Penn Central Transport. Co. v. New York City,* 438 U.S. 104 (1978) and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) and their progeny.

The Connecticut Supreme Court, in November 1999, in a 5-2 *en banc* decision, affirmed a trial court denial of Santini's taking claim on the basis of two state law principles that are *plainly inconsistent* with this Court's takings jurisprudence. *Santini v. Connecticut Hazardous Waste Management Service,* 739 A.2d 680 (Conn. 1999). The court framed the dispositive issue as "whether mere government planning may constitute a taking, in the form of an inverse condemnation . . . ." It held that "mere governmental planning and temporary steps in anticipation of condemnation" do not, as a matter of Connecticut law, constitute a taking. It further held as a matter of state law that since the Service had never reached a "fixed and irreversible intent" to condemn the Santini property, no taking had occurred. The court cited *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 320 (1987) as stating an analogous, one-factor taking test and a conclusion that "depreciation in value of the property by reason of preliminary [government] activity . . ." cannot constitute a taking.

Because it had resolved Santini's taking claim on these state law bases, the court noted, 739 A.2d at 688 n.19, that it was "not necessary to discuss the plaintiffs'

factual claims" of the economic impact of the June 1991 siting designation on their property. The court then rejected as irrelevant the takings jurisprudence of this Court (emphasis added):

> [T] he plaintiffs argue that we may not interpret the Connecticut Constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by the "fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States Constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. *What is meant by that doctrine, however, is irrelevant to this case.*

739 A.2d at 688 n.20. The court did not explain further. Finally, the majority dismissed the relevance of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas*, and *Penn Central* "because none of them involves mere planning by the government." 739 A.2d at 689.

Santini petitioned this Court for a writ of certiorari and was denied, 530 U.S. 1225 (2000).[2]

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[2] The Questions Presented were:

1. Whether a state court, adjudicating an inverse condemnation claim that a property owner has brought in that court under a state law provision because a Fifth Amendment takings claim is not yet ripe under this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, must nonetheless adhere to the standards established by this Court's decisions interpreting the Takings Clause of the Fifth Amendment, and may not fashion it own, contrary takings standards.

[footnote continued]

Having satisfied the *Williamson County* state court requirement (after six years of litigation), Santini then brought a Fifth Amendment taking claim in federal district court in early 2001, No. 3:01 cv 562 (WWE). On August 27, 2002, the court (in an unpublished decision) granted the Service's Motion to Dismiss for lack of jurisdiction. After reciting undisputed facts regarding Santini's development during 1984-91, his vested property rights, and his investment-backed expectations prior to June 1991, the court turned to the *Rooker-Feldman* doctrine, describing it as depriving a federal court of subject matter jurisdiction if "the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment." *Rooker-Feldman's* prohibition, it said, reached not only claims expressly raised or decided in the state court, but all claims "inextricably intertwined," with the scope of "intertwined" being determined by applying the elements of res judicata and collateral estoppel.

The court then shifted its focus to *Williamson County* and observed that "federal law demarcates no clear approached to determine the preclusive effect of a previous state court action instituted . . . in order to satisfy

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2. Whether the Connecticut Supreme Court, adjudicating a claim that a state agency economically idled for two years property on which a subdivision was being built by designating that land as a low-level radioactive waste disposal facility, violated the Takings Clause of the Fifth Amendment by dismissing as "irrelevant" the standards established by this Court in *Penn Central Transportation Company v. New York City*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, and *Lucas v. South Carolina Coastal Council*, and by holding that because the agency never demonstrated a "fixed and irreversible intent" to condemn, its action was "mere government planning" and could never be a temporary taking as a matter of law.

[its] ripeness requirement . . . ." It reviewed holdings of the Tenth and Eleventh Circuits that a Fifth Amendment claim *must* be raised in the state court proceedings. It then recited the contrary view of *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), that a federal taking claim *may* be brought after state court proceedings, but that the federal court must then determine whether the state court provided a determination "equivalent" to a federal adjucation, "so as to invoke . . . issue preclusion." The district court chose to follow *Dodd.* However, in conducting this search for an equivalent adjudication, the district court focused primarily on whether the Connecticut Supreme Court had engaged in a good faith effort to address the merits of the claim. It did not conduct a comparision of whether the Connecticut Supreme Court's 1999 adjudication of Santini's state law claim had employed or adhered to this Court's three-factor *Penn Central* test or its categorical *Lucas* formulation. The district court was also "unpersuaded . . . that collateral estoppel or *Rooker-Feldman* is inapplicable in light of the state court's failure to consider the tests set forth in *Lucas* and *Penn Central.*"[3]

In briefs and argument in the U.S. Court of Appeals for the Second Circuit, Santini argued principally that because he had no opportunity to litigate a Fifth Amendment claim in the state court, and because the Connecticut courts assuredly did not provide him with the equivalent of an adjudication under *Penn Central* and

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[3] Several days after the U.S. District Court issued its opinion in *Santini*, another federal district judge in the Second Circuit resolved nearly identical issues in favor of the property owner, declining to apply *Rooker-Feldman* or the preclusion rules. *See W.J.F. Realty Corp. v. Town of Southampton*, 220 F.Supp.2d 140 (E.D.N.Y. 2002). That case remains pending in the district court.

Lucas, the federal district court erred in dismissing the case on jurisdictional grounds.

SUMMARY OF ARGUMENT

The *Santini* case provides a compelling, current example of the confusion in the lower federal courts about the *Williamson County* state court requirement (Petition at 4-6), and how a property owner's ability to obtain an adjudication that adheres to this Court's taking tests and standards may be extinguished through the combination of state courts ignoring federal law and the lower federal courts applying preclusion rules (Petition at 12-13, 17-18).

ARGUMENT

THE *SANTINI* CASE ILLUSTRATES THE CONFUSION IN THE LOWER FEDERAL COURTS ABOUT THE *WILLIAMSON COUNTY* STATE COURT REQUIREMENT, AND HOW THE STATE AND LOWER FEDERAL COURTS ARE EMPLOYING PRECLUSION RULES TO EXTINGUISH FIFTH AMENDMENT TAKING CLAIMS WITHOUT ADDRESSING THEIR MERITS.

Santini has a textbook taking claim. In 1991, he was engaged in a benign and lawful use of his property, the development of a residential subdivision, for which he had all necessary permits and a vested right under Connecticut law. Prior to the Service's surprise June 10, 1991 designation of his land for public use for radioactive waste disposal, he had, in good faith reliance on his permits, invested more than $9 million. The Service's destruction of the development did not arise from a need to restrain Santini's development or ameliorate any resulting environmental impacts, but from the state legislature's mandate to freeze the development in order to

facilitate physical testing and finally determine the site's suitability for storage of radioactive waste; the Service was acting for its own purposes, for the benefit of dozens of Connecticut corporations, hospitals, utilities, and universities, and to avoid financial penalties being imposed on Connecticut taxpayers. For this public venture, Santini bore a devastating economic burden: for 24 months after the Service's June 1991 announcement, Santini could generate no revenue whatsoever from his development and his investment, and his investment-backed expectations and the property's economically beneficial use were destroyed.

In bringing his taking claim, Santini followed *Williamson County*. He brought a taking claim in state court under the takings clause of the Connecticut Constitution. His pleading choice in this regard has since been validated by this Court in *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 710 (1999) (a Fifth Amendment taking claim "did not accrue" until state court proceedings terminated), and in the Connecticut Supreme Court's previously-mentioned *Melillo* decision (plaintiffs were "not entitled to consideration of [a Fifth Amendment taking claim] because of the existence of a legally sufficient procedure, under [the Takings Clause of the Connecticut Constitution"]), 732 A.2d at 143 n.28.

The Connecticut Supreme Court opinion affirmatively violated this Court's Fifth Amendment Takings Clause jurisprudence in several ways. It rejected the principle that decisions of this Court interpreting the Fifth Amendment furnish minimum national standards for the analysis and adjudication of takings claims brought in state court under available state remedies. It dismissed as irrelevant, without explanation, the three-factor *Penn Central* test, *First English*'s recognition of temporary takings, and the

Lucas categorical formulation of a taking resulting from a total loss of economic use. Because of its application of state law principles, the Connecticut court found it unnecessary to analyze the economic impact of the Service's action on the Santini property; this inquiry, of course, constitutes the first factor of the *Penn Central* test and the starting point of the *Lucas* analysis. The state court declined to employ the principle of *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), that the purpose of the federal Takings Clause is to avoid having an individual bear an economic burden that should, in fairness, be borne by the general public. In addition, the Connecticut opinion employed a governmental "intent to condemn standard," in direct contradiction to such cases as *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (government's intent not relevant to takings analysis). The *Santini* state court decision erroneously elevated this Court's *First English* decision to a single-factor takings test based on whether the governmental activity may be characterized as "preliminary." Further, it stated, in *dictum*, that *all* takings claims require evidence of complete economic loss, thereby contravening several decisions of this Court that recognize taking claims based on partial economic loss. Finally, by employing an intent standard, the Connecticut court effectively eliminated inverse condemnation claims in Connecticut because an inverse taking, by definition, arises from a total or severe impact on economic use that has occurred *without* intent to formally condemn.[4]

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[4] In general, the Connecticut Supreme Court has held land use regulators to a lower standard of compliance with constitutional requirements than other governmental officials, such as police officers. In *Binette v. Sabo*, 710 A.2d 688, 699 (1998), addressing a substantive due process challenge based on police activity, the court compared constitutional liability of police

[footnote continued]

Thus, it is beyond argument that when Santini brought his taking claim in state court under state law, he most assuredly did not receive, expressly or implicitly, an adjudication that was consistent with this Court's Fifth Amendment standards.

And then the federal district court dismissed Santini's Fifth Amendment Takings Clause claim for lack of jurisdiction. The court, after expressing confusion about *Williamson County*, refused to recognize that between *Williamson County*'s mandate that he proceed in state court under state law and the Connecticut Supreme Court's affirmation that it had no jurisdiction to decide a joined federal taking claim, Santini had "no opportunity to litigate" his federal taking claim in the state court, making *Rooker-Feldman* and claim preclusion inapplicable. Moreover, the Connecticut Supreme Court's refusal to examine Santini's factual claim of economic loss should have been dispositive of the Service's defense of issue preclusion, because such consideration is a required element of the *Penn Central* and *Lucas* takings tests. Ultimately, the district court's conclusion that Santini had received the "functional equivalent" of a Fifth Amendment adjudication in the state court was fundamentally flawed because of the district court's failure to examine whether the Connecticut courts had expressly or implicitly addressed and necessarily decided the *Penn Central* factors or the elements of the *Lucas* analysis.

The *Santini* case illustrates the *Kottschade* petition's discussion of the analytical confusion in all courts about

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officers with that of land use regulators. After expressing a concern about imposing liability on members of planning and zoning commissions, the court stated, "In contrast, police officers are public employees who are expected – indeed, required – to comport themselves in accordance with constitutional standards."

the *Williamson County* state court requirement, and the use of preclusion rules by the lower federal courts to extinguish subsequent Fifth Amendment taking claims without ensuring or providing an adjudication on the merits. The draconian consequences of *Williamson County* are magnified when, as in *Santini,* state courts ignore this Court's takings jurisprudence when deciding takings claims brought to them in *Williamson County*-mandated proceedings.

The *Williamson County* state court requirement is desperately in need of clarification if not wholesale reconsideration. Property owners and their counsel are baffled as to how to plead these cases, the state courts are entirely inconsistent in the standards used in adjudicating takings claims,[5] and the federal district courts are confused as to whether or how to apply preclusion rules when faced with a property owner who has been denied compensation in state court and returns to federal court presenting, for the first time, a Fifth Amendment taking claim.

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[5] For a discussion of how the state courts have treated this Court's takings jurisprudence, *see* R. Rosenberg, "The Non-Impact of the United States Supreme Court Regulatory Takings Cases On the State Courts: Does The Supreme Court Really Matter?", 6 Fordham Envtl. L. J. 523 (1995).

CONCLUSION

For these reasons, *amici curiae* Evandro S. Santini and Santini Homes, Inc. respectfully and wholeheartedly support the granting of the Petition for Writ of Certiorari filed by Franklin P. Kottschade.

Respectfully submitted,

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